Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

DINO'S VICTORY ROADHOUSE, INC.
And DEAN GETTLESON,
Petitioners,

v.

CITY OF LOS ANGELES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a state trial court properly rules that a city erroneously denied a permit for expressive activity protected by the First and Fourteenth Amendments, may the state trial court, consistent with the First and Fourteenth Amendments, remand the administrative proceeding to the city to allow the city to reconsider the matter, where the applicable municipal code contains no time limit for the city to act and where the applicants (Petitioners herein) had to wait over 7 months from the day they first applied for the permit until their administrative appeals from the zoning administrator's decision were first heard and decided by the Board of Zoning Appeals, and then by the City Council?

2. Does the First Amendment require only prompt judicial access, or a prompt judicial decision, from the state court's judicial systems?

3. Does a city violate the First Amendment when it erroneously denies a permit for expressive activity and then holds successive hearings for the same permit?

4. Does the First Amendment prohibit a state court judicial system from allowing a city to hold an indefinite number of administrative hearings relative to the granting or denying of a permit for expressive activity without compelling the city to grant the permit?

5. If a state appellate court rules that a city improperly denied a permit for expressive activity protected by the First Amendment, may the city reconsider the matter or is the city required to grant the permit?

PARTIES TO THE PROCEEDINGS

Petitioner: Dino's Victory Roadhouse, Inc. a California Corporation and Dean Gettleson. Dino's Victory Roadhouse, Inc. is a California corporation that is owned and operated by Dean Gettleson, its President.

Respondent: The City of Los Angeles is a municipal corporation in the State of California.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Dino's Victory Roadhouse, Inc. and Dean Gettleson respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal, Second Appellate District, Division Two entered on May 23, 2001. The California Supreme Court denied discretionary review on August 22, 2001.

OPINIONS BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division Two, is reprinted in Appendix A hereto ("App. C") at page 3A. The opinion was filed May 23, 2001. The opinion is unreported. The judgment of the Superior Court of the State of California for the County of Los Angeles was filed on February 28, 2000 (Los Angeles Superior Court Case Number BS060895). The judgment of the Superior Court is unreported but is reprinted in Appendix D hereto ("App. D") at page 25a. On June 19, 2001 the California Court of Appeal, Second Appellate District, Division Two, denied Petitioner's Petitioner for Rehearing. A copy of the unpublished order denying the Rehearing Petition is Appendix B ("App.B") at page 2a. The California Supreme Court denied discretionary review on August 22, 2001. The Supreme Court's order denying review is Appendix A ("App. A") at page 1a.

JURISDICTION

The final judgment of the California Court of Appeal, Second Appellate District, Division Two, reversing the judgment of the Superior Court of the State of California for the County of Los Angeles was entered on May 23, 2001. The California Supreme Court denied discretionary review on

August 22, 2001. This Petition for Writ of Certiorari is filed within 90 days of the denial by the California Supreme Court of Petitioner's Petition for Review. Rule 13 of the Rules of the United States Supreme Court allow this Petition for Writ of Certiorari to be filed within 90 days of the denial by the California Supreme Court of the discretionary review petition filed within that court. This court has jurisdiction by virtue of Title 28, United States Code, Section 1257 (a) in that Petitioners have a right under the First Amendment to the permit in order to provide erotic, strip tease dancing as a form of entertainment. They also have the right to do so without unnecessary delay. This Petition for Writ of Certiorari is timely under Rule 13 because the California Supreme Court's denial of discretionary review was on August 22, 2001.

CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

The First Amendment :

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances."

The Fourteenth Amendment:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

CALIFORNIA STATUTORY LAW

California Code of Civil Procedure §916 provides, in part, as follows:

> "(a). . . [T]he perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matter embraced therein or affected thereby. . . ."

California Code of Civil Procedure § 1094.5 provides, in part, as follows:

> "(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of the facts is vested in the inferior tribunal, corporation, board, officer, the case shall be heard by the court sitting without a jury...."
>
> (b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or

> decision is not supported by the findings, or the findings are not supported by the evidence.
>
> . . .
>
> (f) The Court shall enter judgment either commanding the respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent."

California Code of Civil Procedure §1094.8 provides, in part, as follows:

> "(a) Notwithstanding anything to the contrary in this Chapter, an action or proceeding to review the issuance, revocation, suspension, or denial of a permit or other entitlement for expressive conduct protected by the First Amendment to the United States Constitution shall be conducted in accordance with subdivision (d).
>
> ...
>
> (d) The procedure set forth in this subdivision, when applicable, shall supersede anything to the contrary set

forth in this Chapter.

(1) Within five court days after receipt of written notification from the permit applicant the permit applicant will seek judicial review of the public agency's action on the permit, the public agency shall prepare, certify, and make available the administrative record to the permit applicant.

(2) Either the public agency or the permit applicant may bring an action in accordance with the procedures set forth in this section. If the permit applicant brings the action, the action shall be in the form of a Petition for Writ of Mandate pursuant to §1085 or 1094.5, as appropriate.

(3) The party bringing the action pursuant to this section shall file and serve the Petition on the respondent no later than 21 calendar days following the public agency's final decision on the permit. . . .

(4) The clerk of the court shall set a hearing for review of the petition no later than 25 calendar days from the date the petition was filed. Moving, opposition, and reply papers shall be filed as provided in the California Rules of Court. The petitioner shall lodge the administrative record with the court no later than 10 calendar days in advance of the hearing date.

(5) Following the conclusion of the hearing, the court shall

render its decision in an expeditious manner consistent with constitutional requirements in view of the particular facts and circumstances. In no event shall the decision be rendered later than 20 calendar days after the matter is submitted or 50 calendar days after the date the petition is filed pursuant to paragraph (4), whichever is earlier. . . ."

STATEMENT OF THE CASE

In 1998 Petitioners desired to present erotic, go-go dancers at their cabaret/bar in an area of the City of Los Angeles known as Tarzana. The dancers were to dance topless. It was not disputed and is not disputed that the dancing proposed by Petitioners is protected by the First and Fourteenth Amendments to the United States Constitution, Doran v. Salem Inn, Inc, 422 U.S. 922, 45 L.Ed.2d 648, 95 S.Ct. 2561 (1975); City of Erie v. Pap's A.M., 529 U.S. __ __, 146 L.Ed.2d 265, 120 S.Ct. 1382 (2000). The City advised Petitioners that the type of dancing that it proposed would render the premises an "adult entertainment business" as defined by Los Angeles Municipal Code §12.70(B)(3), (13), (17). The Los Angeles Municipal Code generally prohibits the operation of such a business within 1,000 feet of another one, or within 500 feet of a religious institution, school, public park, or any lot within a residential zone.

However, there is a provision in the Los Angeles Municipal Code that allows for an exception to the zoning restriction. Petitioners needed the exception (i.e. permit) because while their property was zoned correctly for an adult business and complied with the distance restrictions with respect to other adult uses, religious institutions, schools, and public parks, the property was barely within the 500 foot restriction of a residential zone. As stated, the Code allowed

for the granting of an exception to allow the dancing.[1]

To obtain the "exception" (i.e. permit), Petitioners were required by the Los Angeles Municipal Code to file an application and obtain approval by the Los Angeles Zoning Administrator. The Zoning Administrator's decision is reviewable by the Board of Zoning Appeals of the City of Los Angeles. Any decision by the Board of Zoning Appeals is appealable to the Los Angeles City Council.

Instead of first applying for the permit, Petitioners challenged the constitutionality of the permit ordinance on the ground that the procedures are too slow and prompt judicial review is not available. The United States District Court for the Central District of Los Angeles denied Petitioners' request for a preliminary injunction. Among other things the District Court agreed with the City's argument that Petitioners had to exhaust available administrative remedies. Pursuant to stipulation with the City, Petitioners dismissed their federal action without prejudice.

Petitioners then filed their application for the permit ("exception") with the City of Los Angeles on May 7, 1999. The Los Angeles Zoning Administrator conducted a public hearing on the application on July 9, 1999, took the matter under submission, and then rendered a decision denying the application on August 11, 1999.

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[1] Another part of Los Angeles Municipal Code Section 12.70 is the subject of another case pending before this court, City of Los Angeles v. Alameda Books, Inc., No. 00-799, certiorari granted __ U.S. ___, 121 S.Ct. 1223 (2001). City of Los Angeles v. Alameda Books, Inc. is scheduled for oral argument on December 4, 2001.

Petitioners could not immediately seek judicial review in the state court of the denial by the Zoning Administrator because California law required Petitioners to exhaust available administrative remedies first. Board of Police Commissioners of City of Los Angeles v. Superior Court, 168 Cal.App.3d 420; 214 Cal.Rptr. 493 (1985). As stated, Petitioners' initial challenge to the permit system on the ground that it failed to provide for prompt administrative review and prompt judicial access, FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 107 L.Ed.2d 603, 110 S.Ct. 596 (1990) failed in the District Court.

As required by California law, Petitioners appealed the Zoning Administrator's denial of their application to the Board of Zoning Appeals, which affirmed the decision of the Zoning Administrator on October 19, 1999. Again, by virtue of California law, Petitioners were precluded from seeking immediate judicial review because there were still two layers of further administrative appellate review available. Petitioners therefore appealed the adverse decision by the Board of Zoning Appeals to the City Council of the City of Los Angeles. Before being heard by the City Council itself Petitioners first had to present their case to the Planning and Land Use Management Committee of the Los Angeles City Council, which they did. That Committee recommended to the Los Angeles City Council that the Council uphold the denial of the application. A very brief "hearing" was conducted by the Los Angeles City Council. It essentially consisted of a brief oral argument. On December 15, 1999 the Los Angeles City Council voted 12 to 0 to uphold the decision of the Board of Zoning Appeals, which had affirmed the decision of the Zoning Administrator.

Only then could Petitioners seek judicial review in the state court and they did so by promptly filing a Petition for

Writ of Administrative Mandamus pursuant to California Code of Civil Procedure §1094.5 on December 20, 1999.

Pursuant to Code of Civil Procedure §1094.8, the "hearing" in the Los Angeles County Superior Court was conducted on January 13, 2000. The Superior Court reviewed the administrative record and considered the arguments of the parties. The Superior Court took the matter under submission and then rendered its decision on January 28, 2000. The Superior Court ruled that the City of Los Angeles had improperly denied the application.

Consistent with local practice, the Superior Court judge requested Petitioners to prepare the proposed judgment and they did so. Petitioners' proposed judgment for the Superior Court judge's signature provided that the City would be ordered to grant the permit. The City of Los Angeles objected to the proposed judgment on the ground that under California law and, in particular, under California Code of Civil Procedure §1094.5, the Superior Court was limited to setting aside the denial of the permit and lacked the authority to compel the issuance of the permit. The City contended that all the Superior Court could do was set aside the denial and remand the matter to the City of Los Angeles for further proceedings. The City contended that the decision to grant or deny the permit was still discretionary.

Petitioners responded by pointing out that First Amendment licensing permit schemes cannot be discretionary, otherwise they would be unconstitutional. Moreover, Petitioners pointed out that remanding the matter to the City would cause further delay and that delay itself was a violation of the First Amendment. Petitioners relied upon FW/PBS v. City of Dallas, supra.

The Superior Court agreed with Petitioners and ordered the City not only to set aside the denial of the permit but to grant it.

The judgment of the Superior Court was entered on February 28, 2000. The Writ of Mandate itself was issued on March 9, 2000.

Instead of obeying the writ, the City of Los Angeles filed an appeal to the California Court of Appeal, Second Appellate District. Pursuant to California Code of Civil Procedure §916, the filing of the appeal by the City automatically stayed enforcement of the judgment.

On appeal the City of Los Angeles argued primarily that the Superior Court erred in ruling that the City improperly denied the permit. In addition, the City argued that even if the permit application was improperly denied by the City, the only remedy Petitioners had was to go back to the City for another administrative hearing.

On the first point, the Court of Appeal upheld the decision of the Superior Court. Specifically, the Court of Appeal agreed with the Superior Court that the City had improperly denied the application.

Over 15 ½ pages of the Court of Appeal's decision is devoted to its discussion of the administrative mandamus proceeding. In particular, the Court of Appeal concluded that the trial court properly granted the Petition for Writ of Mandate. The Court of Appeal stated at page 16 of the Slip Opinion,

> "For the foregoing reasons, the trial court properly granted the petition for writ of

mandate (Code of Civil Procedure Section 1094.5 subdivision (b)). . . ."

As stated, that was the primary issue before the Superior Court as well as the Court of Appeal - whether the City properly denied the application. However, with respect to the remedy, the Court of Appeal ruled that the Superior Court should not have ordered the City to grant the permit ("the exception"). The Petitioners did argue in the Court of Appeal that a remand to the City was not appropriate and would violate the First Amendment. Petitioners pointed out that the First Amendment required a prompt decision and a prompt remedy - the permit. Petitioners specifically cited to the Court of Appeal FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990), 4805 Convoy, Inc. v. City of San Diego, 183 F.3d 1108 (9th Cir. 1999); Baby Tam & Co. v. City of Las Vegas, 154 F.3d 1097 (9th Cir. 1998) and Baby Tam & Co. v. City of Las Vegas, 199 F.3d 1111 (9th Cir. 2000). The Court of Appeal rejected Petitioners' First Amendment objection to a remand and ruled that the Superior Court should simply remand the case to the City of Los Angeles for further proceedings.

On the limited issue of whether the Court of Appeal properly reversed the Superior Court on the issue of the remand, Petitioners filed a Petition for Rehearing with the Court of Appeal where they again argued that the First Amendment should not allow the state court system to simply send the applicant back to the City for additional administrative hearings. That the Superior Court ruled that the application was improperly denied and that the Court of Appeal affirmed that ruling precluded a remand to the City administrative bureaucracy for further proceedings. This was especially true because under the applicable ordinance and constitutional doctrine, the City was without discretion to

deny the application. Moreover, the decisions of the Superior Court and the Court of Appeal were that there was no evidence to support the denial. Proper findings to support a denial could not be made because of insufficient evidence.

Petitioners also pointed out that the remedy afforded by the Superior Court was consistent with, and indeed, required by the newly enacted Section 1094.8 of the Code of Civil Procedure.

On June 19, 2001 the Court of Appeal denied the Petition for Rehearing.

Petitioners then sought discretionary review with the California Supreme Court by filing a Petition for Review on June 29, 2001 wherein Petitioners again specifically argued that the First Amendment to the United States Constitution applicable to the states by the Fourteenth Amendment, required the immediate issuance of the permit and precluded the Superior Court from simply remanding the matter to the City for further administrative proceedings. On August 22, 2001 the California Supreme Court denied discretionary review without explanation or decision.

REASONS FOR GRANTING THE WRIT

The issue presented by this case is related to the issue which was presented to, but not decided, by this Court in City News & Novelty, Inc. v. City of Waukesha, ___ U.S. ___, 121 S.Ct. 743 (2001). The issue is also related to the issue presented by Thomas v. Chicago Park District, 121 S.Ct. 2191 (2001), a case scheduled to be argued on December 3, 2001 involving permits and the First Amendment.

The issue here to be decided is whether the City, consistent with the First Amendment, can hold endless administrative hearings without being compelled to grant the required permit for expressive activity. It is a state judicial system which allows endless administrative hearings , with no end in sight, constitutional?

This Court has been very sensitive to the problems facing applicants for expressive permits who get trapped in state bureaucracies and cannot obtain the final, necessary permit to operate.

This Court critically examined a state procedural licensing scheme in Freedman v. Maryland, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (1965). In that case this Court reversed the Maryland Court of Appeal, which had affirmed a criminal conviction of a motion picture exhibitor who refused to submit a film to the Board of Censors before showing the film. This Court held that the First Amendment required a prompt final judicial decision. Specifically, this Court stated, 380 U.S. at 58-59, 85 S.Ct. at 739:

> ". . . [T]he exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film. Any restraint imposed in advance of the final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution. Moreover, we are well aware that, even after expiration of the temporary restraining order, an administrative refusal to license, signifying the censor's view

> that the film is unprotected, may have a discouraging effect on the exhibitor . . . Therefore, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of the license."

This Court repeated its ruling from Freedman v. Maryland in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 43 L.Ed.2d 448, 95 S.Ct. 1239 (1975), when it found a violation of the First Amendment in connection with a refusal by a city to allow the presentation of a controversial rock musical entitled, "Hair." This Court began its opinion with the following statement:

> "The issue in this case is whether First Amendment rights were abridged when respondents denied petitioner the use of a municipal facility in Chattanooga, Tennessee, for the showing of a controversial rock musical "Hair." . . . ."

This Court found that there were procedural shortcomings with respect to the process by which the promoter attempted to obtain permission to use the public auditorium. This Court stated,

> "The procedural shortcomings that formed the basis for our decision are unrelated to the standard that the Board applied. Whatever the reasons may have been for the Board's exclusion of the musical, it could not escape the obligation to afford appropriate procedural safe-guards. We need not decide whether the standard of obscenity applied by respondents

> or the courts below were sufficiently precise or substantively correct, or whether the production is in fact obscene. . . . The standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances."

This Court's decision in FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 107 L.Ed.2d 603, 110 S.Ct. 596 (1990) followed Southeastern Promotions, Ltd. v. Conrad case.

Associate Justice O'Connor delivered the opinion of the Court which apparently did not command a majority. The plurality opinion stated that certiorari was granted "on the issue of whether the licensing scheme was an unconstitutional prior restraint that fails to provide adequate procedural safeguards as required by Freedman v. Maryland . . . ." The Court concluded that the city's licensing scheme lacked adequate procedural safeguards. Justice O'Connor stated in her opinion,

> "The core policy underlying Freedman is that the license for a First Amendment protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the

event that the license is erroneously denied . . . ." 493 U.S. at 228.

The circuit courts split with respect to whether this Court intended to require prompt judicial access or prompt judicial decision with respect to the denial of a license. It was this split in the circuits that led this Court to grant certiorari City News & Novelty, Inc. v. City of Waukesha, __ U.S. __, 121 S.Ct. 743 (2001). The case is very similar to the instant case in that the business in question (an adult business) sought a license. The denial of the license was upheld in administrative proceedings and on judicial review in the state courts. Just as Petitioners herein lost administratively, the adult business in City News & Novelty, Inc. v. City of Waukesha lost its administrative review and then challenged that decision in the Wisconsin state trial court. There the applicant lost and then sought review in the intermediate Wisconsin Court of Appeals. Here, in contrast, Petitioners prevailed in the State Superior Court. Ironically they were in a better position than was the petitioner in City News & Novelty, Inc. v. City of Waukesha, which lost in the state trial court and at the intermediate state appellate court level.

Here Petitioners actually prevailed in the state trial court (the Los Angeles County Superior Court) after going through four layers of administrative review. Indeed, by virtue of state law, Petitioners herein were precluded from seeking immediate judicial review of the initial denial of their permit application. They were compelled by state procedural law to exhaust all available administrative remedies by seeking review of the denial first before the City Board of Zoning Appeals, then the Planning and Land Use Management Committee of the City Council, then the City Council itself. Indeed, the Mayor of the City of Los Angeles first had to approve the City Council's denial, which

occurred, before Petitioners could seek judicial review.

After granting certiorari in City News & Novelty, Inc. v. City of Waukesha, supra, this Court later decided to dismiss the petition on mootness grounds. However, this Court manifested its continuing interest in this very important area of First Amendment jurisprudence by granting certiorari in Thomas v. Chicago Park District, 227 F.3d 921 (7th Cir. 2000), cert.granted, 121 S.Ct. 2191 (2001). The case involves a facial challenge to a permit system also pending before this Court on a Petition for Writ of Certiorari is a similar case in the Eleventh Circuit, Cannabis Action Network v. City of Gainesville, 231 F.3d 761 (11th Cir. 2000).

The instant case involves a different, but related, issue - never ending administrative proceedings on a denial of a permit after a state court and the State Court of Appeal holds that the denial was improper. When a permit require by a city ordinance as a condition of engaging in expressive activity is improperly denied, does the First Amendment require that the permit be granted or may be city bureaucracy hold further hearings. The on-going administrative proceedings is the result of a state statutory scheme that provides for the stay of a judgment granting a writ and is also the product of a state appellate system that did not insist upon the granting of the permit after concluding that the permit was improperly denied.

This Court dealt with impermissible delay by a state court judicial system, including the appellate courts, in National Socialist Party of America v. Village of Skokie, 432 U.S. 43, 53 L.Ed.2d 96, 97 S.Ct. 2205 (1977). In that case a state trial court entered an injunction against persons seeking to march in Skokie, Illinois. The marchers appealed to the

intermediate state appellate court, which denied a stay pending appeal. The Illinois State Supreme Court then denied a stay and denied leave for an expedited appeal.

This Court overturned the Supreme Court of Illinois and ruled that the injunction against the parade should be stayed pending appeal. In the instant case the State Court of Appeal overturned a limited but important portion of the trial court's decision - the decision to direct the city to issue the required permit. Instead, the California Court of Appeal ruled that all the Superior Court could do was remand the matter to the city for further administrative proceedings.

Thus, Petitioners have yet to receive the permit (exception) which the Municipal Code requires Petitioners to have in order to engage in expressive activity of a certain nature, i.e., adult entertainment. [2]

This case therefore raises an issue that is not directly raised by Thomas v. Chicago Partners, supra, and which was not directly raised in City News & Novelty, Inc. v. City of Waukesha, but which is extremely important.

What does one do when the state trial court does give fairly prompt judicial review and then correctly decides to order the issuance of a permit, only to be partly reversed by the State Court of Appeal, which correctly ruled that the

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[2] That it is adult entertainment which Petitioners seek to present in this case should not disqualify the activity from First Amendment consideration. See FW/PBS, Inc. v. City of Dallas, supra, which also involved adult entertainment. Likewise, see Southeastern Promotions, Ltd. v. Conrad, supra, which involved adult entertainment.

permit was improperly denied, but which then ruled that Petitioners' only remedy is to have another hearing before various city agencies. Certiorari should be granted to give this Court the opportunity to explore and decide an aspect of the prompt judicial review problem that is not directly presented by Thomas v. Chicago Partners District and which was not squarely presented by City News & Novelty, Inc. v. City of Waukesha, supra.

What good did prompt judicial review at the trial court level do for Petitioners here when the City was able to appeal to the State Court of Appeal and get an automatic stay pursuant to California statutory law. Not only did the automatic stay cause Petitioners tremendous problems but now the Court of Appeal has told the trial court to instruct the city to give Petitioners another hearing. With all due respect to the State Court of Appeal, this makes no sense since the improper denial of an application for a permit should lead to only one conclusion - that the permit should be granted.

If a city bureaucracy can perpetually deny an application, only to be reversed by the trial court, the First Amendment still suffers if the agency gets a second and third bite of the apple.

CONCLUSION

For the foregoing reasons, certiorari should be granted to allow this court to resolve this aspect of the prompt judicial review doctrine now before this court in Thomas v. Chicago Park District, supra.

Respectfully submitted,

ROGER JON DIAMOND
Attorney for Petitioners

APPENDIX A

SUPREME COURT OF CALIFORNIA

Case No. S098863

August 22, 2001, Decided

Dino's Victory Road House, Inc. et al., *Plaintiffs - Respondents*	)
v.	)
City of Los Angeles, *Defendant - Appellant*	)

NOTICE
DECISION WITHOUT PUBLISHED OPINION

Appeal from Second Appellate District
Division Two
No. B139836

OPINION

Petition for review DENIED.

APPENDIX B

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 2

Case No. B139836

June 19, 2001

Dino's Victory Road House, Inc., et. al.	)
	)
v.	)
	)
City of Los Angeles	)
	)

On Appeal From
Los Angeles County
No. BS060895

THE COURT:

Petition for rehearing is denied.

cc: All Counsel
File

APPENDIX C

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

Case No. B139836

May 23, 2001, Filed

DINO'S VICTORY ROAD HOUSE, INC. et al.,)
Plaintiffs and Respondents,)
)
v.)
)
CITY OF LOS ANGELES,)
Defendant and Appellant.)
)

On Appeal From
Los Angeles County
Super. Ct. No. BS060895

APPEAL from a judgment of the Superior Court of the County of Los Angeles, Dzintra Janavs, Judge. Reversed with directions.

James K. Hahn, City Attorney, Claudia McGee Henry, Senior Assistant City Attorney, Michael L. Klekner and John C. Cotti, Deputy City Attorneys, for Defendant

and Appellant.

Roger Jon Diamond for Plaintiffs and Respondents.

The City of Los Angeles (city) appeals from a judgment granting a writ of administrative mandamus (Code Civ. Proc., § 1094.5), requiring it to set aside a decision denying an exception to its zoning restrictions for adult entertainment businesses, and to grant the exception. Although we concur with the trial court's assessment that the city's findings and decision were insufficiently supported, we conclude that the court should have remanded the matter for reconsideration, rather than mandating grant of the exception. We accordingly reverse and direct entry of a new judgment.

FACTS

In 1998, plaintiffs, Dino's Victory Road House, Inc., and its owner, Dean Gettleson, operated a bar in the Tarzana district of the city, at which bikini-clad dancers provided entertainment. Plaintiffs desired to have the dancers dance topless. Such performance would render plaintiffs' bar an "adult entertainment business," as defined by Los Angeles Municipal Code section 12.70(B)(3), (13), (17). (Undesignated section references hereafter are to that code.) The municipal code, in turn, generally prohibits location of such a business within 1,000 feet of another one, or within 500 feet of a religious institution, school, public park, or any lot within a residential zone. (§ 12.70(C).) Plaintiffs' bar is

situated within 500 feet of a residential lot,[1] and therefore plaintiffs ordinarily would be prohibited from conducting topless dancing as desired.

Another provision of the city's zoning law, however, provides for an exception to the residential 500-foot restriction, if a site consistent with the above-described limitations of section 12.70(C) "is not reasonably available elsewhere in the City for the establishment or relocation of the subject adult, entertainment business." (§ 12.22(A)(20).) In that event, an adult entertainment business (other than a massage parlor or sexual encounter establishment) may be established and maintained, or continued in operation, within 500 feet of a residential zone. At the time of the proceedings below, section 12.22(A)(20)(a)(i) provided that "A site is 'reasonably available" elsewhere in the city if it meets all of the following criteria: [¶] (1) Its use as the proposed adult entertainment business is consistent with all applicable zoning regulations, including Section 12.70-C. [¶] (2) It is available for use, purchase, or rental as an adult entertainment business. [¶] (3) It has adequate street access, street lighting, and sidewalks. [¶] (4) It is at least 500 feet away from any uses which are or may become obnoxious or offensive by reason of" various enumerated emissions.

Section 12.22(A)(20) also includes procedures for securing the exception. Following an application, the city's zoning administrator holds a hearing and renders a decision. The exception must be approved "if it meets the requirements" set forth immediately above. At the time of the

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[1] Plaintiffs extrinsically dispute this fact, but have conceded it for purposes of this litigation.

proceedings below, the zoning administrator's determination was subject to appeal to the Board of Zoning Appeals (board), and from there to the City Council (council). Finally, section 12.22(A)(20)(a)(ii) provided: "If the Zoning Administrator, Board or Council disapproves an exception, then it shall make findings of fact showing wherein a site consistent with Section 12.70C is reasonably available elsewhere in the City for the establishment or relocation of the subject adult entertainment business."

These procedures for recognition of an exception to section 12.70 were enacted shortly after the United States Court of Appeals for the Ninth Circuit affirmed the grant of a preliminary injunction against enforcement of the section, on grounds there existed serious questions whether it provided existing adult businesses a sufficient number of allowable relocation sites, and thus afforded the "reasonable alternative avenues of expression" requisite to a constitutionally valid zoning law for protected matter. *(Topanga Press, Inc. v. City of Los Angeles* (9th Cir. 1993) 989 F.2d 1524, 1534 *(Topanga Press);* see *id.* at pp. 1532-1533; *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 53-54 (*Renton*).)

In early 1998, some dancers at plaintiffs' bar did expose their breasts. In September 1998, the city issued plaintiffs an order to comply with section 12.70(C). Plaintiffs responded with a federal court action seeking to enjoin enforcement of the ordinance. After their application for a preliminary injunction was denied, plaintiffs stipulated to dismissal without prejudice. They then filed an application for an exception under section 12.22(A)(20), as well as for a zoning variance, both to permit topless dancing at the bar within 500 feet of a residential zone.

The hearing on plaintiffs' variance and exception application, before an assistant zoning administrator (ZA) on July 9, 1999, was not reported, pursuant to his ruling. Various witnesses spoke or provided letters in opposition to plaintiffs' requests. The ZA also received a written statement in opposition from the local city councilmember, Laura Chick. The statement referred to the councilmember's "belie[f]" that "there are several locations in the West San Fernando Valley, including Council District Three, which are 'reasonably available'. These sites are reasonable in that they are separated from residential uses by a significantly greater distance than 500 [feet] and would not negatively impact residential neighbors."

In a letter submitted to the ZA following the hearing but before close of the evidence, plaintiff Gettleson stated: "I have thoroughly searched throughout the City of Los Angeles to look for a site that is 'reasonably available....' [¶] I could fred no other site that complies with the definition of 'reasonably available' in Section 12.22A.20. [¶] There are no other properties that have adequate street access, street lighting, and sidewalks and are available for use, purchase, or rental as an adult entertainment business. Also, such a property would have to be at least 500 feet away from obnoxious or offensive activities "

On August 11, 1999, the ZA denied both the requested variance and the exception under section 12.22(A)(20). With regard to the latter, the ZA made the following findings to the effect that a site was reasonably available elsewhere in the city. First, in finding 6, the ZA found that availability of sites meeting applicable zoning restrictions was supported by a chart (exhibit G) in a January 1998 report to the council by

the city's department of city planning, regarding a proposed restriction of billboard advertising of alcohol and tobacco products. Exhibit G showed that there existed approximately 16,000 acres of industrial land under the city's general plan that were more than 500 feet away from residential land uses under that plan. This constituted about 696 million square feet of land, versus the 1,800 square footage ofplaintiff's business. The ZA concluded that "the amount of industrial acreage located more than 500 feet from residential use throughout the city and the issuance of permits to new adult businesses [discussed below] is a reasonable and credible argument that other available sites exist without the need to grant an exception."Regarding the availability of a site for use, purchase, or rental as an adult business, the ZA, in his finding 7, relied on the facts that "No portion of the City is known to be in a rental or sales freeze," and plaintiffs had not presented evidence "suggesting that industrial land 500 feet from an 'R' zone is not available in the City." In addition, evidence provided in plaintiffs' federal suit indicated that at least two new adult cabarets had obtained building permits in the San Fernando Valley in 1998 (one of them on the same street as plaintiff's current location), and that building permits had been issued in 1998 to two existing adult businesses.

As for the definitional requirement that a reasonably available site have adequate street access, lighting, and sidewalks, the ZA found, in finding 8, that "Properties identified in Finding No. 6 are in developed areas where such infrastructure is generally available. The applicant has identified no property he considered for his business which lack such facilities." And with regard to the fourth qualification, that the site be at least 500 feet away from any uses which are or may become obnoxious by reason of

emissions, the ZA found, in finding 9: "No evidence has been presented by the applicant showing that any property considered by the applicant was subsequently rejected due to elevated levels of these impacts as compared to the City in general."

The ZA's relevant findings concluded as follows: "10. **A site consistent with Section 12.70-C is reasonably available elsewhere in the City for the establishment of an adult cabaret.** [¶] Based upon recent permits issued to two adult cabarets last year in combination with the industrial acreage figures which portray several thousand acres of land cited earlier, I cannot conclude that new and prospective adult businesses are precluded by zoning regulations from establishing themselves due to limited availability of sites in the city. The facts support the opposite conclusion, that sites generally exist whereby an adult cabaret may locate by right in [certain] Zones, where such properties are at least 500 feet from an A or R Zone. The applicant has offered no data nor any other evidence on his own behalf which would lend support to his presumption that there is no land in the City of Los Angeles capable of accommodating another adult cabaret. Therefore, the granting of an exception to Section 12.70-C is not necessary."

Plaintiffs appealed to the board, only from the denial of the section 12.22(A)(20) exception. The ZA, plaintiffs' counsel, and several opponents appeared before the board. Among other things, plaintiffs argued that the properties the ZA had referred to had not been shown to be free of noxious emissions. Plaintiffs also argued section 12.22(A)(20) required a finding regarding a particular site, and that Gettleson's statements should have been credited, because

unrebutted. The board, however, denied the appeal. In their brief on-the-record deliberations, two of the four members stated that it was not incumbent on the city to "find" a site for plaintiffs. The board sustained and adopted verbatim the ZA's findings regarding the reasonable availability of an alternative site.

Plaintiffs then appealed to the council. The appeal was initially heard by the council's Planning and Land Use Management Committee (committee), on December 14, 1999. Gettleson submitted a declaration reaffirming that "I have looked for a substantial amount of time for property that would meet the requirements of the code and have found none." His declaration also stated that he had visited the four permitted sites referenced in the ZA's decision. Two of them were within 500 feet of residential uses, having apparently been grandfathered under section 12.70(C), while the other two were within 500 feet of uses that emitted noxious matter.

The ZA testified, in part, "What I did is I looked at... a report that been prepared for another purpose in which the City was looking at billboard locations and the question was 'How many acres are there in the City where billboards would be at least 500 feet from residential use?' and according to that study there are approximately 16,000 acres of industrial land at least 500 feet from a residential zone. [¶] This applicant could locate by fight without any entitlement request in such... 16,000 acres. He needs approximately 1800 square feet of land. The applicant did not indicate to us a single lot that he had considered. He claims that he can't find a location and essentially has tried to shift the burden on us to find him a location. I don't believe that's the way the ordinance is intended to work."

In response, plaintiffs' attorney argued in part that exhibit G was irrelevant and insufficient because it addressed only land separated from residential property, n t from churches, parks, schools, and other adult uses, as required by section 12.70(C). The committee also received opposition testimony, from the Tarzana Property Owners Association and Councilmember Chick's office.

Councilmember Bernson, the committee chair, then stated: "Members of the Committee, as author of the ordinance I think I have a little insight going back a few years on it. [¶] [Plaintiffs] did meet all the requirements except for one and they say they can -- they have the ability to request an exception, but the City also has the ability to deny that exception because of the residential proximate of under 500 feet. So it's not something that we have -- we have to approve. It's an optional decision on the part of the City. [¶] I don't know that the Billboard Ordinance has any relevance here because there's a different set of criteria altogether as far as material is concerned and also which direction boards face and so forth and what corridors they're along, as a matter of fact....So I -- I cannot support the appeal but I would ask for a motion from one of the members."

Councilmember Miscikowski then moved to deny the appeal, on the basis, among others, that there was no evidence to support granting the exception. She stated that "[a]lthough in the Billboard Ordinance findings may not be particularly pertinent," they did identify much land that could qualify, and that "more to the point" was the ZA's identification of adult entertainment uses that had recently permitted. The motion to deny the appeal carded unanimously.

The following day, the council considered plaintiffs' appeal. Member Bernson again stated, "[T]he location is within 500 feet of residential use, which clearly gives the City the option of not approving this application, and I would urge an aye vote on the Committee report." The council denied the appeal by a 12-0 vote. Although the administrative record states that the council adopted findings on this decision, it does not contain any.

On December 20, 1999, plaintiffs filed their petition for writ of administrative mandamus. The petition alleged, among other things, that (1) the city had improperly imposed on plaintiffs the burden of proof regarding the conditions requisite to an exception; (2) neither the ZA, the board, nor the council had made the findings required by section 12.22(A)(20); (3) there was no substantial evidence to support such findings; (4) the decision was not supported by the findings made; and (5) the City had not proceeded in the manner required by law.

The matter was heard under the expedited procedures provided by Code of Civil Procedure section 1094.8, for permits to conduct expressive activities. On January 28, 2000, the trial court issued its decision, granting the petition. After holding that the city had had the burden of proof at the administrative level, the court ruled, in relevant part: "Under the express language of the [Municipal] Code and case law cited by petitioner, [citations] the findings made herein are inadequate and not supported by substantial evidence in the record as they do not identify specific sites available to the petitioner. Although reasonable people may question the wisdom of placing the burden on the City to find and identify specific available business locations for adult businesses,

precedent which this Court must follow, so holds."

The court directed plaintiffs' counsel to prepare a proposed judgment and writ, requiring the city to set aside its decision "and issue a new decision in conformance with this Court's ruling herein." Plaintiffs submitted a judgment and writ requiring the city to grant them the exception to section 12.70(C). The city objected, on grounds the proper disposition would be to remand the matter to it for reconsideration. The city cited Code of Civil Procedure section 1094.5, subdivision (f), to the effect that a judgment requiring the administrative order be set aside "shall not limit or control in any way the discretion legally vested in the respondent."

The court overruled the city's objections, stating that because the record did not contain evidence of specific sites, the city's findings were not supported by substantial evidence, and the city "is not entitled to hold a 'new trial' and present new evidence as to availability of sites. Based on the record and in accordance with the relevant case law and the City's own code, the City must grant the exemption sought." However, the city would not be precluded from denying plaintiffs a permit for reasons other than proximity to a residential zone. The court accordingly issued the writ prepared by plaintiffs, after entering a modified judgment that granted it but provided, "If there is a lawful basis for denying Petitioners any permit sought other than proximity to R zone, the City is not precluded from proceeding in any manner authorized by law."

DISCUSSION

Constitutional limitations on restrictive zoning of adult businesses form the backdrop to this case. Under *Renton, supra,* 475 U.S. 41, zoning of the type imposed by section 12.70 is "properly analyzed as a form of time, place, and manner regulation." *(Renton, supra,* at p. 46.) Accordingly, in measuring the constitutionality of such ordinances against the First Amendment, *"Renton* requires the court to determine whether the ordinance, as implemented, is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. [Citation.]" (*People v. Superior Court (Lucero)* (1989) 49 Cal.3d 14, 26; accord, *Renton, supra,* 475 U.S. 41., 50.) The first qualification generally follows without difficulty on grounds that such ordinances, aimed at the "secondary effects" of adult businesses, address "a city's 'interest in attempting to preserve the high quality of urban life....'" *(Ibid.,* quoting *Young v. American Mini-Theatres* (1976) 427 U.S. 50, 71.) However, since *Young* and *Renton,* numerous cases, brought by adult business applicants or operators, have challenged zoning ordinances on the basis that they did not allow sufficient alternative accommodation for adult uses. Resolution of these challenges has involved factual assessment of the sufficiency of property available for those uses. Some recent examples of such cases, involving California cities with ordinances much like section 12.70(C), are cited in the margin.[2]

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[2] *City of National City v. Wiener* (1992) 3 Cal.4th 832 *(National City)* [sufficient land reserved; ordinance constitutional]; *Lim v. City of Long Beach* (9th Cir. 2000) 217 F.3d 1050 *(Lim)* [remanding for further consideration of availability of sites]; *Diamond v. City of Taft* (9th Cir. 2000) 215 F.3 d 1052 [adequate

This, however, is not such a case. It is not a challenge to the constitutionality of section 12.70. Rather, it involves construction and application of a special exception to that ordinance, section 12.22(A)(20), which was emplaced following the decision in *Topanga Press, supra,* 989 F.2d 1524, apparently as a safety valve for section 12.70(C)'s exclusion of both new and existing adult uses within 500 feet of residential zoning.[3]

The trial court ruled that the city's decision denying plaintiffs an exception under section 12.22(A)(20) was erroneous and unsupported, because the city failed to make the findings the ordinance required, and the findings it made were not supported by substantial evidence. In other words, in the terms of Code of Civil Procedure section 1094.5, subdivision (b), the City "ha[d] not proceeded in the manner required by law, the...decision [was] not supported by the findings, [and] the findings [were] not supported by the evidence." The city contends that the trial court's analysis was flawed in several respects, namely in its allocation of the administrative burden of proof, its construction of section 12.22(A)(20), its assessment of the sufficiency of the evidence, and ultimately its requirement that the city grant the

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number of sites available; ordinance constitutional]; *Levi v. City of Ontario* (C.D. Cal. 1999) 44 F.Supp.2d 1042 *(Levi)* [insufficient number of potentially available sites shown; ordinance unconstitutional].)

[3] Section 12.70(C) operates most severely in this connection. Although its prohibitions respecting schools, parks, and churches extend only to the establishment, substantial enlargement, or transfer of ownership of adult uses, the section prohibits continued operation -- i.e., requires discontinuation -- of such uses within the 500-foot residential perimeter.

exception rather than make new findings. Although we disagree with some of the trial court's reasoning, we conclude that its decision was essentially correct, with the exception of the relief afforded.

We first review the salient features of the section 12.22(A)(20) exception. First, it is mandatory and nondiscretionary. If a site for an adult business, lawful under section 12.70(C), is not "reasonably available," as defined, elsewhere in the city, the applicant may continue to operate (or may establish) that business within 500 feet of a residential zone, and an exception to that effect "shall be approved." (§ 12.22(A)(20)(a)(ii).)[4] Second, the definition of "reasonably available" includes four qualifications for the site (or sites): (1) computability with all zoning regulations, including the restrictions of section 12.70(C); (2) availability "for purchase, use, or rental as an adult business"; (3) adequate street access, street lighting and sidewalks; and (4) situation at least 500 feet from uses which are or may become obnoxious or offensive by reason of emissions. (§ 12.22(A)(20)(a)(i).) Third, if either the zoning administrator, board, or council disapproves an exception, "it shall make findings of fact showing wherein a site consistent with Section 12.70(C) is reasonably available elsewhere in the City for the establishment or relocation of the subject adult entertainment business." (§ 12.22(A)(20)(a)(ii).)

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[4] Thus, Councilmember Bernson's statements that the council had the "option" to disapprove plaintiffs' application for exception because of proximity to a residential zone (*ante*, pp. 7-8) were simply wrong.

1. Burden of Proof

Citing *Levi, supra,* 44 F.Supp.2d 1042, the trial court ruled that it had been the city's burden to prove that an alternative site was not reasonably available. *Levi* did hold that the defendant city had to assume the burden of proof *(id.* at pp. 1049), and the same was true both of other cases *Levi* cited *(ibid.)* and the recent Ninth Circuit decision in *Lim, supra,* 217 F.3d 1050, 1054. However, these were cases challenging the constitutionality of adult zoning ordinances, and the issue as to which they addressed the burden of proof was whether the ordinances afforded sufficient alternative avenues of communication. Once again, that was not the issue in the administrative proceedings here.

Plaintiffs argue that the burden of proof belonged to the city because it was the city's responsibility to show wherein a site was reasonably available. But to the extent that this argument reflects the conventional allocation of the burden of proof to the party asserting a claim (Evid. Code, § 500), it fails to recognize that the city was not so much an adverse party to the administrative proceedings as the decision-maker, and that plaintiffs themselves were seeking an exception predicated on the unavailability of a location. In that position, plaintiffs would ordinarily be the ones with the burden. Their argument that one should not have to prove a negative does not ring true in the context of section 12.22(A)(20), which sets forth a negative proposition as the precondition for the exception.

On the other hand, a well-recognized exception to the general rule of Evidence Code section 500 exists where the evidence necessary to establish a fact lies peculiarly within the

knowledge and competence of a party other than the one who is asserting the claim. *(Sanchez v. Unernployrnentlns. Appeals Bd.* (1977) 20 Cal.3d 55, 70-71.) That rule may well have been apposite here, to impose on the city the burden to come forth with the evidence required for the findings it had to make.

We need not address the issue further. Both sides presented evidence, and the ultimate issue in this connection is whether substantial evidence supported the city's findings. The issue of burden of proof was essentially digressive, and not dispositive.

2. *Sufficiency of Findings and Their Evidentiary Support.*

The trial court held that the city's findings were inadequate to support the decision (see Code Civ. Proc., § 1094.5, subd. (b)), because they did not identify specific sites available for relocation by plaintiffs. The court concluded that both section 12.22(A)(20) and certain case law required findings of this nature. The city challenges this conclusion. Although we agree that the city was not necessarily obligated to make findings identifying particular relocation sites -- e.g., addresses, as plaintiffs contended before the board -- we also agree with the trial court's overall conclusion that the findings the city did make were inadequately general.

The city was not required by case law to identify specific sites, as the court believed. The case law to which the court referred once again involved tests of the constitutionality of adult zoning ordinances, from the standpoint of provision of adequate alternative locations.

These cases did not involve application of section 12.22(A)(20). Moreover, although the some of these cases were litigated by analyzing particular sites the municipality propounded, in discovery or at trial, the ultimate issue generally involved the sufficiency of suitably zoned and potentially available land. (E.g., *Lim, supra,* 217 F.3d 1050, 1053-1056; *Diamond v. City of Taft, supra,* 215 F.3d 1052, 10551057; cf. *National City, supra,* 3 Cal.4th 832, 847; *Renton, supra,* 475 U.S. 41, 53-54.)

The dimensions and content of the findings the city was obligated to make if it denied plaintiffs, an exemption are governed by section 12.22(A)(20). The ordinance required "findings of fact showing wherein a site consistent with Section 12.70(C) is reasonably available elsewhere in the City for the establishment or relocation of the subject adult entertainment business." "Reasonably available" is defined as including four attributes. Construed together, all of this language points to the necessity of rather specific identification of sites, even if not the singling out of a particular one.

Thus, the ordinance uses the article "a," which may connote either a single one or one of a number. (See Black's Law Dictionary (6th ed. 1996), p. 1.) It also requires that the findings show "wherein" a site is reasonably available. The conjunction "wherein" may mean "where," as plaintiff would have it, but also "how." (Merdam-Webster's Collegiate Dictionary (10th ed. 1999), p. 1346.) But however these terms are viewed in the context of this ordinance, the crucial provisions are the restrictive defining elements of "'reasonably available.'" Those qualifications mean that the city's findings had to show that a site or sites existed possessing specific

attributes, including but not limited to qualified zoning.

The findings the city made were inadequate, and also lacked substantial evidentiary support.[5] Among the most plainly deficient were the findings (ZA's finding 6) that there existed alternative sites in compliance with section 12.70. The ZA and the board referred primarily to exhibit G in the billboard report, something the councilmembers later discerned as not particularly relevant. It was not. Exhibit G tabulated only land more than 500 feet from residential zones. It did not show that, where, or how much of the acreage it included also met the further spacing requirements of section 12.70(C), regarding schools, parks, religious institutions, and other adult establishments. The city attempts to cure this deficiency by pointing to another page in the billboard report, which reflects approximately 12,000 commercial and industrial acres standing 1,000 or more feet from planned residential uses, schools, and parks. But not only was this item of evidence not referred to by the ZA or the board, it also does not account for section 12.70(C)'s requirements of 500-foot spacing from religious institutions, and 1,000-foot spacing from other adult businesses.[6]

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[5] We address the findings made by the ZA and the board. As noted above, the record does not include findings by the council, even though it was required to make them if it denied the exception. If no such findings were adopted, that would be an independent deficiency.

[6] The latter requirement imposes a "72-acre buffer zone surrounding each .adult business." *(Walnut Properties, Inc. v. City of Whittier* (9th Cir. 1988) 861 F.2d 1102, 1108.) Depending on their concentration, this feature may drastically limit the number of allowable businesses. *(Ibid.)*

The findings regarding the site (or sites) being available for adult business use also were deficient. They were not positively descriptive, and they too focused on land beyond 500 feet of residential zones, without regard to section 12.70(C)'s other requirements.. They also relied on permits previously granted for four occupied locations, which Gettleson had testified did not comply with section 12.70(C).

The findings with respect to presence of street access, sidewalks, and lighting were similarly hollow. They simply referred generally to "Properties identified *[sic]* in Finding No. 6...." And the findings regarding location of the site or sites 500 feet away from noxiously emitting uses contained no facts whatsoever to this effect. Instead, they stated that plaintiffs had not presented evidence that they had rejected any site "due to elevated levels of these impacts as compared to the City in general." This was not a positive finding about the existence of qualified alternative locations, nor did it respond to the relevant qualification in section 12.22(A)(20).

The ZA and the board proceeded to find that a site consistent with section 12.70(C) was reasonably available "for the establishment of an adult cabaret." The finding stated that, based on the acreage in exhibit G and the recent issuance of two permits for adult cabarets, new adult businesses were not precluded by the city's zoning "from establishing themselves due to limited availability of sites," and that "sites generally exist whereby an adult cabaret may locate by right...at least 500 feet from an A or R Zone " This critical finding did not fulfill what section 12.22(A)(20) required. First, it referred to establishment of adult cabarets generally, not relocation of plaintiffs' business. Second, instead of including facts showing "wherein" (where or how) a site was reasonably

available, as defined, the conclusory finding simply made a general declaration that one could be. Finally, the finding focused exclusively on the 500-foot residential perimeter, without reference to section 12.70(C)'s other spacing requirements.

The city's findings thus were insufficient, under section 12.22(A)(20), to support the administrative decision denying plaintiffs' application for exception. Moreover, the findings lacked substantial evidentiary support. The evidence cited for them consisted of the billboard report's exhibit G, and the fact that building permits for two new adult cabarets and two other adult businesses had been issued the preceding year. Exhibit G was insufficient as discussed above, and the fact of other permit grants in a prior year -- for sites that the evidence indicated did not meet the strictures of section 12.22(A)(20) -- did not substantiate that a site for plaintiffs' business was now reasonably available. Nor did Councilmember Chick's statement that she "believed" that certain unidentified locations were reasonably available, because they were 500 feet from residential uses, constitute substantial evidence. It too reflected an incomplete understanding of section 12.22(A)(20), which requires that sites in full compliance with section 12.70(C) be available, lest an applicant be permitted to utilize a site within 500 feet of a residential zone.

For the foregoing reasons, the trial court properly granted the petition for writ of mandate. (Code Civ. Proc., § 1094.5, subd. (b).) There remains for consideration the extent of the relief ordered.

3. The Scope of the Writ.

The trial court issued a writ requiring that the city grant the exception. The court ruled that remand to the city for reconsideration was inappropriate because, the record lacking evidence of specific sites, the city was "not entitled to 'hold a new trial' and present new evidence as to the availability of sites." But this rationale fails in light of our holding that findings of specific sites were not necessarily required. The city conceivably could also comply with section 12.22(A)(20) by making findings showing the existence of neighborhoods, blocks, or other sectors possessing the four defining characteristics required for sites reasonably available for adult businesses, or by making other findings of fact more specifically attuned to the ordinance's defining requirements. The basic problem here was the nonconformity of the city's findings with the requirements of section 12.22(A)(20). Where the agency has not proceeded in accordance with law, remand for further proceedings is appropriate. *(Medlock Dusters, Inc. v. Christensen* (1973) 35 Cal.App.3d 565, 570-571.) We see no reason not to direct the traditional remedy of reconsideration. (See *Fascination, Inc. v. Hoover* (1952) 39 Cal.2d 260, 268.)

Although we agree with plaintiffs that the city, strictly speaking, does not possess discretion to deny an exception if its preconditions are established, the fact that the record below did not support an affirmative finding of reasonable availability, as properly defined, does not mean that the absence of reasonable availability was conclusively established. This is not a case like *Tripp v. Swoap* (1976) 17 Cal.3d 671,677, in which the absence of substantial evidence to support a denial meant that all conditions for approval had been met. We believe that the appropriate disposition is to return plaintiffs' application for proper consideration at the

administrative level.

DISPOSITION

The judgment is reversed, with directions to enter a new judgment granting a peremptory writ of mandate requiring the city to set aside its decision denying plaintiffs' application for a zoning exception and to reconsider the application in conformity with this decision. Plaintiffs shall recover costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

/s/_____
COOPER, J.

We concur:

/s/_____
BOREN, P.J.

/s/_____
TODD, J.

APPENDIX D

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State Bar No. 40146

Attorney for Petitioners

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

CASE NO. BS060895

February 28, 2000, Filed

DINO'S VICTORY ROAD HOUSE, INC.,)
A CALIFORNIA CORPORATION, AND)
DEAN GETTLESON,)
Petitioners,)
)
vs.)
)
CITY OF LOS ANGELES, A MUNICIPAL)
CORPORATION,)
Respondent)

JUDGMENT GRANTING WRIT OF ADMINISTRATIVE MANDAMUS

The hearing on Petitioners' Petition for Writ of Administrative Mandamus having been conducted on January 13, 2000, Roger Jon Diamond appearing for Petitioners and John C. Cotti appearing for Respondent, and the Court having taken the matter under submission, the Court on January 28, 2000 determined that there was not substantial evidence in the record to justify the denial of the exception. The Los Angeles Municipal Code mandates the granting of the exception unless there is evidence justifying the denial.

GOOD CAUSE APPEARING, IT IS HEREBY ORDERED that a Writ of Mandate issue under the seal of this Court directing the City of Los Angeles to vacate and set aside its decision denying the exception and to grant the exception to the Los Angeles Municipal Code Section 12.70.. If there is a lawful basis for denying Petitioners any permit sought other than proximity to R zone, the city is not precluded from proceeding in any manner authorized by law. The City shall file a return to the Writ in D 8J on 3/27/2000.

Petitioners to recover costs against Respondent in the sum of $_____.

February 28, 2000

/s/_____
JUDGE SUPERIOR COURT
DZINTRA I. JANAVS

(2)

No. 01-817

Supreme Court, U.S.
FILED
FEB 7 2002
CLERK

In The

Supreme Court of the United States

DINO'S VICTORY ROADHOUSE, INC.
and DEAN GETTLESON,

Petitioners,

v.

CITY OF LOS ANGELES,

Respondent.

On Petition For Writ Of Certiorari To The California Court Of Appeal Second Appellate District

BRIEF IN OPPOSITION OF RESPONDENT CITY OF LOS ANGELES

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PARTIES TO THE PROCEEDINGS

This Brief in Opposition to the Petition for a Writ of Certiorari is submitted on behalf of respondent, City of Los Angeles. The City of Los Angeles (hereinafter "City") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of an unpublished decision of the California Court of Appeal, 2nd Appellate District.

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MEMORANDUM OPPOSING CERTIORARI

1. This Case Is Not Suitable for Supreme Court Review Because the Petitioners Have Not Suffered an Injury.

The purpose of this Brief in Opposition to the Petition for Writ of Certiorari is to correct the impression that the City has precluded the petitioners, Dino's Victory Roadhouse, Inc. and Dean Gettleson ("petitioners") from operating an adult entertainment business at 18484 Oxnard Street in the City of Los Angeles during the pendency of the City's administrative process and subsequent judicial proceedings. In fact, the Court of Appeal decision recognizes that dancers at petitioners' bar began exposing their breasts in 1998. (Appendix to Petition 6a).

The petitioners state that they have "yet to receive the permit (exception) which the Municipal Code requires Petitioners to have in order to engage in expressive activity of a certain nature, *i.e.*, adult entertainment." (Petition 20). This statement implies that the petitioners are not in fact operating an adult entertainment business at the premises. However, the petitioners have been and continue to operate an adult business on the premises. Therefore, this case does not raise the issue of whether the prompt judicial review requirement, announced by this Court in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), requires a prompt judicial determination on the merits or merely prompt access to court review when a regulatory scheme operates as a prior restraint on the exercise of First Amendment rights.

However, this case is very similar to *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001) where

this Court dismissed the writ of certiorari because the issue of prompt judicial review was not genuinely presented. In *City News,* this Court was asked to "resolve a conflict among the circuits concerning whether the guarantee of prompt judicial review that must accompany [an adult business] licensing scheme means a prompt judicial determination or simply the right to promptly file for judicial review." *Id.* at 282, *citing* the Pet. for Cert. 13. The petitioner in *City News* applied for a renewal of its adult business license. Waukesha denied the application finding that City News had violated a Waukesha Ordinance by allowing minors to loiter on the premises, failing to maintain an unobstructed view of booths in the store, and allowing patrons to engage in sexual activity inside the booths. *Id.* This Court granted certiorari from the Wisconsin Court of Appeals to address the procedural requirements necessary to guard against unconstitutional prior restraint of expression.

In dismissing the writ of certiorari in *City News,* this Court held that the requirement of prompt judicial review was not accurately reflective of City News' grievance because City News was not seeking an end to the status quo of silence, but rather, seeking to maintain the status quo of speech. *Id.* at 285. Because City News was already licensed to conduct an adult business, the Court ruled that City News' concern was not one of prior restraint.

Like the petitioners in *City News,* the petitioners have failed to allege the actual existence of a prior restraint. There is nothing in the petition or record which demonstrates that the City has prevented the petitioners' presentation of adult dancing. The petitioners are not

seeking an end to the status quo of silence, but rather seeking to maintain the status quo of speech.

Furthermore, the petitioners never argued in the proceedings before the Superior Court or the California Court of Appeal that they were being prevented from presenting adult entertainment. Nor does the record demonstrate that the petitioners ever sought an injunction to prevent the City from enforcing any order limiting the presentation of adult entertainment. Code of Civil Procedure § 1094.5(g) clearly authorizes the court to grant a stay of the administrative order or decision. Their failure to seek such relief precludes this Court's review, and the petition for writ of certiorari should be denied.

2. The Petitioners' Reliance on *Freedman v. Maryland* Is Without Merit.

In an attempt to secure Supreme Court review, however, the petitioners rely on *Freedman v. Maryland*, 380 U.S. 51 (1965) and its progeny to assert that the First Amendment requires a prompt judicial decision when a municipality requires a permit for expressive activity. Yet, in each of the cases cited by petitioners, this Court addressed the issue of whether a municipality's licensing of protected First Amendment activity operated as a prior restraint, thereby necessitating the procedural safeguards announced in *Freedman* and *FW/PBS*. Here, the petitioners admittedly could not comply with the City's adult use ordinance due to its proximity to a residential zone, and therefore, made no challenge to the constitutionality of the City's ordinance. (Appendix to Petition 6a). Rather, the petitioners sought relief from the adult use ordinance

pursuant to Los Angeles Municipal Code § 12.22A(20) which operates to provide the "reasonable alternative avenues of expression" requisite to a constitutionally valid zoning law for protected matter. (Appendix to Petition 5a, 6a, *citing, Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524 (9th Cir. 1993)). The licensing schemes at issue in *Freedman* have no bearing on the instant action and, as such, certiorari should be denied.

In *Freedman,* a state law required that every motion picture film be submitted to a Board of Censors prior to being shown anywhere in the state. *Freedman, supra,* 380 U.S. at 51, n.1. The statute punished the exhibitor of a film not submitted "and approved and licensed by the Maryland State Board of Censors." *Id.* This Court characterized the ordinance as an invalid prior restraint which could only withstand constitutional scrutiny if it provided procedural safeguards designed to obviate the dangers of a censorship provision. *Id.* at 58. Because the motion picture licensing scheme failed to provide such safeguards, this Court reversed the conviction.

Similarly, in *FW/PBS, Inc. v. Dallas, supra,* an adult business sought review of a Dallas ordinance which regulated sexually oriented businesses through a scheme incorporating licensing, zoning, and inspections. In holding the ordinance unconstitutional, this Court ruled the Dallas licensing scheme operated as an unconstitutional prior restraint because it failed to set a time limit within which the licensing authority must issue the license. In so holding, this Court noted that the core policy consideration underlying its holding is to prevent the undue delay which might result in the unconstitutional suppression of protected speech.

The concerns necessitating the procedural safeguards at issue in *Freedman* and *FW/PBS* were not at issue in this case as presented to the lower courts. The Petitioners have failed to demonstrate that they have been subjected to an invalid prior restraint.

CONCLUSION

As stated above, there is no compelling reason for this Court to grant a writ of certiorari in this case. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

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In the
Supreme Court of the United States

DINO'S VICTORY ROADHOUSE, INC.
And DEAN GETTLESON,
Petitioners,

v.

CITY OF LOS ANGELES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

PETITIONER'S REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners filed their Petition for Writ of Certiorari on November 17, 2001 and the City of Los Angeles, after obtaining extensions of time to file its opposition, filed its opposition on February 8, 2002. Supreme Court Rule 15(6) authorizes this Reply Brief addressed to new points raised in the brief in opposition.

The brief in opposition distorts the fact and attempts to insulate the California Court of Appeal's decision from this Court's review. A municipality which obtains a favorable ruling by a state appellate court should not be able to defeat certiorari jurisdiction by the manipulation of the facts and procedure.

The City attempts to mislead this Court by implying that dancers at Petitioners' bar have been dancing with their breasts exposed since 1998. The City asserts that Petitioners have suffered no injury and that therefore the decision of the California Court of Appeal is insulated from this Court's review. In the first paragraph of the City's opposition the City states that "[T]he Court of Appeal decision recognizes that dancers at Petitioner's bar began exposing their breasts in 1998. . . ." (Brief in Opposition, p.1).

The Court of Appeal's decision states that ". . . In early 1998 some dancers at Plaintiffs' bar did expose their breasts. . . ." (Appendix to Petition, p.6a). However, as the opinion of the Court of Appeal goes on to say, in September of 1998 the City issued an Order to Comply with Section 12.70(C). Petitioners did comply by ceasing the presentation of topless dancing. Instead, Petitioners filed a federal civil rights lawsuit seeking to enjoin enforcement of the ordinance. See opinion of State Court of Appeal at Appendix 6a.

The City then goes on to say at page 3 of its opposition,

> ". . . Nor does the record demonstrate that the petitioner ever sought an injunction to prevent the city from enforcing any order limiting the presentation of adult entertainment. . . ."

Petitioners cannot believe that the City would make such an argument in the face of the opinion of the Court of Appeal, which states,

> ". . . Plaintiffs responded with a federal court action seeking to enjoin enforcement of the ordinance. . . ." (Petitioner's Appendix 6a).

Petitioner is at a loss to know why the City would make the statement at page 3 of its opposition that Petitioners never sought an injunction when in fact they did so, as the opinion of the Court of Appeal recognizes.

Indeed, at page 9 of their Petition for Writ of Certiorari Petitioners made reference to the fact that they did seek an injunction from the federal district court. Petitioners asserted at page 9 of their Petition,

> "Instead of first applying for the permit, Petitioners challenged the constitutionality of the permit ordinance on the ground that the procedures are too slow and prompt judicial review is not available. The United States District Court for the Central District of California denied Petitioners' request for a preliminary injunction. Among other things the District Court agreed with the City's

> argument that Petitioners had to exhaust available administrative remedies. Pursuant to stipulation with the City, Petitioners dismissed their federal action without prejudice."

In other words, the City argued successfully in the federal district court that Petitioners' only remedy was to pursue their administrative remedies. They did so. This Petition for Writ of Certiorari is the last step in the process.

Contrary to the facts, the City falsely asserts that Petitioners never sought an injunction.

What is especially upsetting to Petitioners is the failure of the City to acknowledge in its opposition that not only did Petitioners seek an injunction, which the City claims did not occur, the City itself argued in the federal district court that Petitioners' sole remedy was to apply for the permit (the exception). That is, the City argued successfully in the federal district court that Petitioners were required to exhaust available administrative remedies, which is exactly what they are doing.

To make matters worse, the City also erroneously relies upon California Code of Civil Procedure Section 1094.5(g) for the proposition that a court can grant a stay of an administrative order or decision. This is a blatant misrepresentation of California procedural of law. Code of Civil Procedure Section 1094.5(g) states, in part, as follows:

> "[T]he court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court. . . ."

What this means is that if there has been an order or decision suspending or revoking a permit or a license, such order or decision may be stayed pending state judicial review. In the instant case, however, there is no order or decision to be stayed. Had there been an order or decision that could have been stayed, Petitioners would have sought an emergency stay under Code of Civil Procedure Section 1094.5(g) when they filed their lawsuit in the Superior Court of California. Nothing could be stayed because what the Petitioners challenged in the Superior Court was the denial of the exception. One cannot "stay" a denial. There is nothing to stay.

Accordingly, the City's statement at page 3 - "their failure to seek such relief precludes this Court's review. . . . -is simply wrong.

Indeed, Petitioners won in the Superior Court. They not only obtained an order from the Superior Court setting aside the denial of the permit (the exception), they also obtained an order compelling the City to grant the exception. That is better than a temporary stay under Code of Civil Procedure Section 1094.5(g). That is a ruling on the merits.

Unfortunately the City did not honor the judgment of the Superior Court by granting the exception (the permit). Instead, the City appealed to the California Court of Appeal. California Code of Civil Procedure Section 916 automatically stayed the judgment in favor of Petitioners. Code of Civil Procedure Section 916 (a) is reprinted at page 4 of the Petition for Writ of Certiorari. Therefore, the record before this Court conclusively establishes that the judgment in favor of Petitioners was stayed pending appeal by virtue of Code of Civil Procedure Section 916. Indeed, we are beyond the issue of the stay because the Court of Appeal "reversed" that

portion of the Superior Court's judgment compelling the City to grant the permit (the exception). Instead, the California Court of Appeal remanded the matter to the Superior Court with directions to allow the City to have another administrative hearing.

The issue before this Court is whether the City, consistent with the First Amendment, may avoid the issuance of the permit (the exception) by simply conducting another administrative hearing. As matters stand now, and the record is undisputed on this point, Petitioners not only lack the required permit (the exception) they have never had one!

The City should not be able to manipulate this Court's certiorari jurisdiction with false representations as to the record. The City has asserted that if Petitioners do operate a topless facility they will be violating the Municipal Code and each day is a separate violation for which there is a misdemeanor sanction (one year in the county jail). The City has one year to file criminal charges against Petitioners if they do operate as an adult facility without the exception. The fact is they lack the exception (the permit) and the City has threatened action.

It is no answer to say that if Petitioners do violate the ordinance by presenting topless dancing and if they do get convicted they are free to challenge any convictions in court. They may not do so because the decision of the California Court of Appeal becomes the law of the case (unless reversed by this Court) and administrative agencies and courts will be obligated under California law to follow the decision of the Court of Appeal. If the decision of the Court of Appeal is contrary to the First Amendment, this Court has jurisdiction to review that decision.

Whether or not some dancers at Petitioners' business chose to dance topless or not on a limited basis, thereby subjecting the premises to misdemeanor prosecutions, is irrelevant to this Court's certiorari jurisdiction.

This case is not moot and there is a live controversy. If the decision of the State Court of Appeal stands, Petitioners will still be without the required permit (exception) and would be required to go through further administrative hearings.

Not only has the City never told Petitioners that they may operate as an adult facility while these proceedings are pending, they have affirmatively told Petitioners that if they operate as an adult facility without the permit or exception (and they still lack the permit or exception), they will be subject to criminal prosecution.

The City argues that the instant case is very similar to City News and Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 121 S.Ct. 743 (2001), but it is significantly different in one material respect. As this Court pointed out in footnote 2 of its decision, "[T]he [Waukesha] Council expressly permitted City News to continue in business during the pendency of state - court proceedings. . . ." In contrast, the City of Los Angeles has not expressly permitted Petitioners to operate in violation of the City's adult zoning code. To the contrary, the City has threatened enforcement action. The only thing that can prevent the City from enforcement is the grant of certiorari by this Court and a ruling that the Court of Appeal erred in allowing the City of Los Angeles a second bite of the apple, especially where the City has not "expressly permitted [Petitioner] . . . to continue in business during the pendency of state - court proceedings. . . ."

This Court ultimately dismissed the certiorari petition in City News and Novelty, Inc. v. City of Waukesha, supra, because this Court was of the view that petitioner City News and Novelty had closed its business. This Court stated in City News and Novelty, Inc. v. City of Waukesha, 531 U.S. at ____, 121 S.Ct. at 746.

> "It is undisputed that City News has ceased to operate as an adult business and no longer seeks to renew its license.
> Observing that City News neither pursues nor currently expresses an intent to pursue a license under Waukesha law, Waukesha asserts that the case has become moot, for City News no longer has 'a legally cognizable interest in the outcome.'"

In contrast, Petitioners here clearly have an interest in the outcome of this case. They want this Court to reverse the Court of Appeal below on the issue of whether the matter can be remanded to the City for further proceedings. They assert they are entitled to their permit (exception), having already gone through a lengthy administrative process once and having prevailed in the Superior Court and the Court of Appeal on the issue of whether the City properly denied the permit (exception). Since Petitioners prevailed in the Superior Court and in the Court of Appeal on the issue of whether they were denied properly, they should be able to obtain the required permit (exception). They should not be relegated to endless administrative hearings, especially where the City has not expressly permitted Petitioners to operate and where there is no ordinance allowing such activity without the required permit (exception).

It is extremely important for this Court to grant certiorari because these procedural problems confront many persons seeking to exercise First Amendment rights who are relegated to ineffective state court procedure. It is time for this Court to review this entire issue.

The City has produced no evidence that it has expressly allowed Petitioners to operate without the permit or the exception. The City has referred us to no evidence that provides that until final judicial review is obtained one may operate as though one possesses the required permit or exception.

The City wants the decision of the State Court of Appeal to stand so that the City can then hammer the Petitioners. This Court has jurisdiction to review the decision of the California Court of Appeal and the City has not advanced one argument that this Court is without jurisdiction to hear the matter.

A lot of cynics believe that when state court decisions favor the government (and not the First Amendment), that this Court allows the decisions to stand but when the opposite is true, City of Erie v. Paps A.M., 529 U.S. 277, 146 L.Ed.2d 265, 120 S.Ct. 1382 (2000) this Court will grant certiorari to reverse a judgment of a State Supreme Court even when the case appears to be as moot as the City of Erie case. Certiorari should be granted so that this Court can explain that its mootness jurisdiction is neutral and is not manipulated to allow anti First Amendment state court cases to stand and to reverse pro First Amendment state decisions.

Respectfully submitted,

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